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October 17, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 5, 2005

Case Number: TSO-0177

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should not be restored.

I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also referred to as a security clearance) are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) ("the 'clearly consistent with the interests of national security' test indicates that 'security-clearance determinations should err, if they must, on the side of denials'"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has

the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(b)(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, *i.e.*, that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

II. BACKGROUND

The Individual has been employed by a contractor at a DOE facility in a position that requires him to have an access authorization. The Individual has had four alcohol-related arrests.

Two arrests occurred in 1999 and 2000. In April 1999, the Individual was arrested for public intoxication; in March 2000, the Individual was arrested for driving under the influence of alcohol (DUI). DOE Ex. 3.4; see also DOE Ex. 1.1. In February 2002, a DOE security specialist interviewed the Individual and referred him to a DOE consultant-psychiatrist (the DOE Psychiatrist). In an April 2002 report, the DOE Psychiatrist determined that, although the Individual had two alcohol-related arrests less than one year apart, there were no indications that the Individual's drinking "rose to a maladaptive level, either at the range of an abuse or dependency." DOE Ex. 2.1. The DOE Psychiatrist also concluded that the Individual did not have a mental illness or disorder that would cause a significant defect in judgment or reliability. *Id.*

In the summer of 2003, a little over a year after the DOE Psychiatrist's April 2002 report, the Individual had two additional alcohol-related arrests. In June 2003 and July 2003, while holding the access authorization, the Individual was arrested for two separate DUI offenses. DOE Ex. 3.1; see also DOE Ex. 1.4. In September 2003, a DOE security specialist interviewed the Individual and referred him again to the DOE Psychiatrist. In his October 2003 report, the DOE Psychiatrist concluded that the Individual met the criteria for alcohol abuse in early remission, set forth in the Diagnostic and Statistical Manual 4th Ed., published by the American Psychiatric Association (the DSM-IV). DOE Ex. 2.2. The DOE Psychiatrist noted the Individual's two DUI arrests within a short period of time and determined that "[the Individual] has a maladaptive pattern of drinking, and during the past 12 months, he has continued to drink recurrently and engaged in a physically hazardous

activity, i.e. drinking and driving." *Id.* at 6. The DOE Psychiatrist concluded that the Individual's condition impaired his judgment and reliability. *Id.* Based on the Individual's report that he had stopped drinking the month before the psychiatric interview, the DOE Psychiatrist determined that the Individual was in early remission. *Id.*

In July 2004, the DOE notified the Individual that his four alcohol-related arrests and the DOE Psychiatrist's diagnosis constituted derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8(j) and (l) (Criteria J and L). Notification Letter, July 22, 2004. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. See Individual's Letter, August 17, 2004.

In a December 2004 memorandum, the DOE forwarded the request for a hearing to the Office of Hearings and Appeals (OHA). The OHA Director appointed me to serve as the hearing officer.

In a January 2005 letter to the parties, I discussed the issues raised by the Notification Letter, as well as the type of information relevant to those issues. In particular, I noted that, once the DOE has derogatory information raising a security concern, the Individual has the burden of resolving that concern. I explained how an individual may attempt to resolve a security concern related to alcohol-related psychiatric diagnoses.

Given the applicable standard, individuals who wish to challenge a psychiatric diagnosis are well-advised to seek a second opinion from a psychiatrist or clinical psychologist and to have that professional testify at the hearing. I mention this matter at this point, because if [the Individual] wishes to seek a second opinion, he needs to do so promptly so that the professional can complete his evaluation and commit to a hearing date. Finally, individuals who seek to resolve a concern about alcohol consumption need to bring in witnesses who can testify concerning their alcohol consumption.

Hearing Officer's Letter, January 19, 2005. In that same letter, I enclosed a copy of "Questions and Answers Concerning Department of Energy Personnel Security Hearings under 10 C.F.R. Part 708."

Beginning in late January 2005, the Individual sought and was granted several postponements of the hearing, in order to permit him additional time to obtain a professional evaluation. See Individual's e-mail, January 28, 2005; Hearing Officer's Letter, March 28, 2005 (discussing March 23, 2005 pre-hearing conference). In my March 28, 2005 letter, I advised the Individual to contact me by April 1, 2005 to advise me of the date of his appointment, but the Individual did not respond to that request. In an April 27, 2005 pre-hearing conference, the Individual reiterated his intention to see a mental professional, and I again set a hearing date. April 28, 2005 Letter (discussing April 27, 2005 pre-hearing conference). A week before that date, the Individual requested a further postponement, stating that he was told that he needed to be in an eight-week alcohol program before an evaluation could be made. He provided no reason for his months-long delay in seeking an evaluation. I denied any further extension, but advised the Individual that he could file supplemental information 30 days after the hearing.

At the hearing, the Individual represented himself. The Individual offered his own testimony and that of eight co-workers. The local DOE office presented one witness: the DOE Psychiatrist.

Following the hearing, the Individual filed an updated statement. He stated that had had not consumed alcohol for two months, had quit drinking, and was entering an eight-week alcohol program.

III. THE HEARING

The Individual did not dispute the matters giving rise to the Notification Letter, i.e. his four alcohol-related arrests and the DOE Psychiatrist's diagnosis. Instead, he testified that since that time he had significantly reduced his consumption of alcohol and is now reformed and rehabilitated. Portions of the testimony relevant to that contention are discussed below.

A. The Individual

The Individual testified as follows. He stated that he attended several Alcoholics Anonymous (AA) meetings, but ultimately came to the conclusion that he was not an alcoholic. Transcript (hereinafter "Tr.") at 95-96. He stated that his AA mentor told him that his behavior was inconsistent with alcoholism. *Id.* at 104. However, the Individual stated, he had

concluded that he had abused alcohol. *Id.* at 102. Accordingly, the Individual stated, he stopped associating with people who "essentially went to bars and just drank." *Id.* at 97. The Individual stated that he began limiting himself to two drinks at a time and determined that this "was a reasonable lifestyle that would keep [him] from getting into trouble." *Id.* at 98. He stated that he had not had more than two drinks at a time in almost two years. *Id.* The Individual stated that he became involved in community service and found the experience rewarding and intended to continue with it. *Id.* at 98-99. The Individual described his work life and social life "well in order." *Id.* at 101.

The DOE counsel noted that the Individual's 2003 DUI arrests occurred after the February 2002 personnel security interview, in which the Individual stated that he had developed a "zero tolerance" policy toward drinking and driving. The DOE counsel asked the Individual to reconcile the arrests and that statement. *Id.* at 112. The Individual's response was as follows:

- A. Yeah, that was a year apart, and again, I think it was just the time away from, you know, drinking and driving. And then, like I said, I followed that, but my pattern still, I think, has some aspects that were not healthy in the sense that, you know, abusing alcohol could happen. And through that year I just -- it was probably about six months before that event, I -- you know, I just said to myself, well, you know, I think I'm pretty much fine now, if I just have a beer I can drive. And even though -- and people testified to this, even though I drove still then very rarely after drinking, it wasn't like I just said, oh, go out and party and drive. I said, you know, I think that if I very cautiously do this, I can do this. And that switched in my mind, I think, during that time. So even though I was doing it very rarely, then all of a sudden I -- you know, so I got in the situation where because I was driving after having drank, that there became occasions where I had more than the legal limit and drove.

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[A]gain, I state that even though there were these two occasions that happened, it was still actually extremely rare for me to drive after drinking. But I did switch to the attitude where I thought I could drive after drinking.

Id. at 112-114. The Individual stated that he did not intend to stop drinking altogether. He stated he believed that he had a healthy lifestyle and did not see a reason to change it unless he was advised to do so. *Id.* at 123.

B. The Co-Workers

Several of the Individual's co-workers testified that they interacted with the Individual socially. *Id.* at 11, 21, 32, 44, 81. Five of the Individual's co-workers, including the two supervisors, stated that they did not recall ever seeing the Individual under the influence of alcohol. *Id.* at 38, 45, 56, 64, 73. The Individual's co-worker/former roommate stated that the Individual and he had shared an apartment from mid-2001 to mid-2003 and the Individual engaged in "social drinking." *Id.* at 87. He stated that the Individual's drinking was not excessive and has never affected the Individual's work life or "other aspects of his life to the point where it was problematic." *Id.* at 88.

C. The DOE Psychiatrist

The DOE Psychiatrist testified that he interviewed the Individual on two separate occasions. *Id.* at 133, 137. He stated that after the initial interview, in April 2002, he assessed the Individual's case as a "borderline situation" and that he gave the Individual "the benefit of the doubt." *Id.* at 136. The DOE Psychiatrist stated that at that time there was evidence that the Individual "was showing reformation." *Id.* at 137. In contrast, after his second interview with the Individual, in October 2003, the DOE Psychiatrist stated, "there was proof at this time that [the Individual's] use of alcohol was maladaptive and I made a diagnosis of alcohol abuse." *Id.* at 138. The DOE Psychiatrist concluded that the Individual's judgment and reliability were impaired. *Id.*

After listening to the testimony of the Individual and his co-workers at the hearing, the DOE Psychiatrist noted that the Individual had taken several positive steps, but the fact that he still consumed alcohol was of concern. *Id.* at 140. The Psychiatrist stated that he would classify the Individual as being in "partial remission." He explained "partial remission" as when

an individual has definitely made some improvements, but still there are ongoing instances where alcohol is being

used, even at a reduced level. And if I might just digress a little bit, the manual, DSM-IV, in reality doesn't so much ascribe to the quantity of alcohol being used, but more along patterns of behavior or consequence. And the main issue of concern, of course, is this a situation wherein we have [the Individual], who has been exposed to four instances of alcohol related arrests that have caused him quite a disruption, I would say, in his work, although he continues to be heavily involved with duties and obviously for good reason because he is very skilled and very knowledgeable in his work. And the other issue that is of concern is that, although he is not drinking and driving at this point, therefore not exposing himself to any danger, the use of alcohol, at least from a pharmacological viewpoint, exposes an individual to be prone, or makes an individual prone to reduced inhibitions. So there is always a chance, there is always a risk that he may deteriorate again into driving and - driving after drinking, or engaging in behavior that could be potentially dangerous.

Id. at 141-142. The DOE Psychiatrist indicated that, in the Individual's case, he would look for a period of at least twelve months of abstinence from alcohol to demonstrate rehabilitation or reformation. *Id.* at 143-144. The DOE Psychiatrist noted that although it had been nearly two years since the Individual had any alcohol-related problems, "given that there have been repeated instances, at least four definite instances, it would be on the safe side to abstain from alcohol." *Id.* at 144.

IV. APPLICABLE STANDARD

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). In that case, the individual has the burden to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing

on the relevant security concerns. *Id.* § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a).

V. ANALYSIS

The derogatory information in this case concerns alcohol use, which raises a concern under Criterion J, and trustworthiness and reliability, which raises a concern under Criterion L. Since the derogatory information giving rise to the security concerns under Criteria J and L is so closely intertwined, I will address those security concerns together. The Individual concedes that he had an alcohol problem but maintains that his alcohol consumption in the last two years is moderate and consistent with reformation and rehabilitation. Thus, the Notification Letter was well-founded, and the only issue to be resolved here is whether the Individual has shown adequate evidence of reformation and rehabilitation.

The Individual's continued alcohol consumption precludes a finding of reformation or rehabilitation. The DOE Psychiatrist testified that the Individual suffers from alcohol abuse, in partial remission. The DOE Psychiatrist further testified that, in the Individual's case, a period of at least one year of abstinence from alcohol would be necessary to demonstrate complete rehabilitation. *Id.* at 143. The DOE Psychiatrist's evaluation is consistent with the DSM-IV, and the Individual presented no conflicting expert testimony or evaluation.

At the hearing, the Individual appeared to argue that he should have additional time to obtain a medical evaluation, because the DOE Psychiatrist's report did not set forth the one-year abstinence standard. That argument is incorrect. The DOE does not bear the burden of directing the Individual's rehabilitation.

In sum, the Individual has had four alcohol-related arrests. DOE Ex. 3.1, 3.4; see also DOE Ex. 1.4. He was evaluated by the DOE Psychiatrist in 2003, and he received the Notification Letter in July 2004, notifying him that the DOE Psychiatrist had diagnosed him with alcohol abuse. The DOE Psychiatrist's uncontroverted testimony was that the generally accepted standard of one year of abstinence was the appropriate standard for reformation and rehabilitation in this case. It is undisputed that the Individual has continued to drink and, therefore, has not satisfied that standard. Based on the

foregoing, I have found that the Individual has not demonstrated that he is reformed and rehabilitated.

VI. CONCLUSION

The Individual has not resolved the Criteria J and L concerns set forth in the Notification Letter. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I have concluded that the Individual's access authorization should not be restored.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: October 17, 2005